MOTION FILED
AUG 17 2005

No. 05-85

IN THE

Supreme Court of the United States

POWEREX CORP.,

Petitioner,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE GOVERNMENT OF CANADA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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August 17, 2005

* Admitted in New York; admission pending in the District of Columbia

MOTION OF THE GOVERNMENT OF CANADA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Government of Canada ("Canada") moves, pursuant to Supreme Court Rule 37, for leave to file the annexed Brief as *amicus curiae* in support of the petition for a writ of certiorari of Powerex Corporation. Petitioner has consented. Undersigned counsel have made efforts to obtain consent from respondents, and have received written consent, copies of which are annexed, from counsel for the following respondents:

AES Alamitos LLC
AES Corporation
AES Huntington Beach LLC
AES Redondo Beach LLC
Arizona Electric Power Cooperative, Inc.
Avista Energy, Inc.
Duke Energy[1]
IDACORP Energy, L.P.
Idaho Power Company
MIECO, Inc.
Northern California Power Agency
Portland General Electric Company
PPL Montana, L.L.C.
Puget Sound Energy, Inc.
Reliant Energy Inc., and its affiliates
Sacramento Municipal Utility District
Sierra Pacific Industries
Silicon Valley Power (City of Santa Clara)
TransAlta Energy Marketing Company
Tucson Electric Power Company.

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[1] Counsel for Duke Energy Trading and Marketing, LLC and its affiliates indicated via e-mail that "Duke energy consents."

Canada is filing this Motion because it has not received responses from the remaining respondents as of the time of the printing of the Brief.

The issue presented by the petition -- whether, when Powerex Corporation is acting on behalf of the Government of British Columbia, it is, and is entitled to be treated as, part of British Columbia, and therefore to be accorded sovereign status under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611 -- is a matter of significant concern to the Government of Canada and its citizens. Because Canada believes its views would materially assist the Court in its consideration of the petition for a writ of certiorari, Canada respectfully requests leave to file the attached Brief.

Dated: Washington, D.C.
August 17, 2005

Respectfully submitted,

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This Brief *amicus curiae,*[1] submitted in support of petitioner's request for a writ of *certiorari*, is accompanied by a Motion for Leave to File Brief as *Amicus Curiae* in Support of Petitioner.

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[1] No counsel for a party authored this Brief in whole or in part. No person other than the *amicus curiae* made a monetary contribution to the preparation or submission of this Brief.

THE INTEREST OF *AMICUS CURIAE* THE GOVERNMENT OF CANADA

The Government of Canada, as sovereign, has a vital interest in the issue addressed in this Brief *amicus curiae*: whether, when Powerex Corporation ("Powerex") is acting on behalf of the Government of British Columbia, it is, and is entitled to be treated as, part of British Columbia, and therefore to be accorded sovereign status under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611 (the "FSIA"). Although Powerex concedes it is not immune from suit, the FSIA "guarantee[s] a foreign state defending an unbarred claim certain protections," including the right to have claims against it tried to a United States District Judge, without a jury. *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 484 (2003) (Breyer, J., concurring in part and dissenting in part); *see* 28 U.S.C. § 1603(b)(2).

In deciding to exercise their powers through political subdivisions or controlled corporations, Canada or its political subdivisions consider whether immunity and other sovereign prerogatives are available, under principles of international law, to the entity through which they act. Because sovereigns may choose to act through a variety of entities in more than one jurisdiction, predictability in the application of the rules governing sovereign status is of special importance. By departing from the rules applied by other United States Courts of Appeals, the Ninth Circuit's decision creates uncertainty as to whether the actions of Canada or its political subdivisions may be subjected to scrutiny by state court juries.

Canada has an especially strong interest in the practical consequences of this Court's decision because, given the interdependence of the economies of Canada and the United States -- which enjoy the largest bilateral trading

relationship in the world -- the definition of "sovereign" applied in United States courts is likely to have significant effects on the conduct of business across the Canadian-United States border.

The heightened unpredictability as to sovereign status flowing from the Ninth Circuit decision seriously threatens to impair that relationship. Canada's strong interest in predictability of the application of rules determining sovereign status, and honoring the benefits due sovereigns, leads it to support the petitioner's request that this Court review and reverse the decision below.

SUMMARY OF ARGUMENT

The Ninth Circuit found -- and Canada agrees -- that British Columbia is itself a "political subdivision" or "constituent unit" of Canada, thereby coming under the definition of "state" or "sovereign" under the FSIA. *California* v. *NRG Energy, Inc.*, 391 F.3d 1011, 1024-25 (9th Cir. 2004). Powerex is wholly owned by British Columbia Hydro and Power Authority ("BC Hydro"), which is itself treated as a foreign sovereign. The Ninth Circuit concedes BC Hydro to have been, in all respects relevant to this lawsuit, performing "sovereign functions." *Id.* at 1025. Under recognized principles of international law, Powerex is equally entitled to be treated as a sovereign when it is acting on behalf of BC Hydro or of the Government of British Columbia. Those principles also require that great weight be given to the views of British Columbia regarding Powerex's sovereign status.

Determination of sovereign status is governed by rules of customary international law regarding the sovereign equality of States and non-interference by one State in the internal affairs of another. *See, e.g.*, Ian Brownlie,

Principles of Public International Law 287-88 (6th ed. 2003); *Oppenheim's International Law*, 81-82 (Robert Jennings & Arthur Watts, eds., 9th ed. 1992). Both of these tenets are fundamental to the international legal system. Thus courts charged with determining the content of the applicable rules must look to the practice of States on questions of immunity and sovereign status. These are found both in national law -- legislation and decisions of national courts -- and in the principles recently codified in the United Nations Convention on the Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, U.N. G.A., 59th Sess., U.N. Doc. A/RES/59/38 (Dec. 16, 2004).

Principles of comity recognized by both Canadian and United States courts require courts to interpret their national legislation in a manner consistent with international law and the practice of States in all cases in which it is possible to harmonize the two, as it is here. Complying with international law principles serves the interests of predictability, enabling a sovereign to determine the best way to structure its activities and to exercise its powers. Honoring comity also ensures that the views of the sovereign that creates an entity -- as British Columbia did with respect to BC Hydro and Powerex -- are accorded special weight in deciding whether an entity like Powerex is an organ, agency, or instrumentality of British Columbia.

Rules of international comity promote the cooperation and accommodation essential to the orderly and harmonious regulation of international commerce. Adherence to these principles is essential to the functioning of the closely related economies of Canada and the United States. Disregard of these fundamental principles, where the responsible government has chosen to act itself through State entities, will only complicate and impede commercial relations between the two countries. Disregard of

international law also intrudes upon, and derogates, the sovereign prerogatives, rights, and interests of the Government of Canada and its Provinces and other political subdivisions to decide the manner in which Governmental activities will be conducted.

ARGUMENT
I.

THIS COURT SHOULD REVIEW THE DECISION BELOW BECAUSE, BY DEPARTING FROM DECISIONS OF OTHER COURTS OF APPEALS, THE NINTH CIRCUIT'S DECISION CREATES UNCERTAINTY AS TO WHETHER STATE-CREATED ENTITIES WILL BE TREATED AS SOVEREIGNS.

The decision below departs from those of other Courts of Appeals, specifically the Second, Third, and Fifth Circuits, regarding the types of entities that are entitled to sovereign treatment under the FSIA. *See USX Corp.* v. *Adriatic Ins. Co.*, 345 F.3d 190, 209 (3d Cir. 2003) ("an entity that engages in activity serving a national interest and does so on behalf of its national government qualifies for the protections of the FSIA, including a federal forum"), *cert. denied*, 541 U.S. 903 (2004). *See also Filler* v. *Hanvit Bank*, 378 F.3d 213, 217 (2d Cir.) (in determining whether an entity is entitled to sovereign treatment under the FSIA, courts should consider various factors, including (1) whether the entity was created for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the entity is required to hire public employees and whether the foreign state pays the employees' salaries; (4) whether the entity holds any exclusive rights in the foreign country; and

(5) how the entity is treated under foreign state law), *cert. denied*, 125 S. Ct. 677 (2004); *Kelly* v. *Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846-48 (5th Cir. 2000) (considering the same five factors as the Second Circuit and noting "we will *not* apply them mechanically or require that all five support an organ-determination").

This divergence of views creates considerable uncertainty for Canada, its Provinces, and other political subdivisions, in determining both how to structure the entities through which they conduct their affairs and how to allocate responsibilities among state-created entities that carry out sovereign functions. In order to properly exercise their powers, foreign sovereigns need predictability with respect to the way United States courts interpret the FSIA's applicability to entities created by sovereigns and conducting activities on their behalf, such as Powerex.

II.

UNITED STATES COURTS SHOULD INTERPRET THE FSIA IN A MANNER CONSISTENT WITH PRINCIPLES OF COMITY AS APPLIED IN CUSTOMARY INTERNATIONAL LAW AND THE PRACTICE OF STATES.

Principles of international law and comity properly apply when United States courts consider how they should interpret the term "sovereign" under the FSIA. The importance of comity is heightened in this particular case, where the political subdivision that created Powerex and determined what functions it should perform has a view very different from that of the Ninth Circuit as to whether Powerex is entitled to the procedural protections accorded to sovereigns. This Court should not affirm the ruling below, which disregards the views of the sovereign that creates an

entity and the standards for determining sovereign status applied by the State under whose laws the entity was formed. A decision by this Court affirming the Ninth Circuit would adversely affect the ability of foreign sovereigns, such as Canada and its political subdivisions, to decide how to structure the entities through which they conduct their affairs. Acceding to principles of comity of nations would, in contrast, lead to an interpretation of the FSIA that is consistent with that of other States and with international law, thus providing needed predictability to States in structuring and carrying out their sovereign functions.

This Court, like Canadian courts, has long held that international law considerations form an essential element of statutory construction. Over two hundred years ago, Chief Justice Marshall articulated what has become a fundamental canon of statutory construction, namely, that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

This Court has repeatedly reaffirmed the vitality of Chief Justice Marshall's rule, firmly establishing principles of comity as part of the jurisprudence of the United States. Thus, the opinion in *F. Hoffman-LaRoche Ltd.* v. *Empagran S.A.*, 542 U.S. 155 (2004), followed the rule that "this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *Id.* at 236.

The Courts of Appeals have similarly recognized the fundamental role of comity in United States jurisprudence. In *United States* v. *Aluminum Co. of Am.*, 148 F. 2d 416 (2d Cir. 1945), for example, Judge Learned Hand cautioned that "we are not to read general words, such as those in [the Sherman Act] without regard to the limitations customarily

observed by nations upon the exercise of their powers . . . ." *Id.* at 443. *See also Restatement (Third) of Foreign Relations Law of the United States* § 403 (1987), the commentary to which confirms the "rule of construction" that statutes must be interpreted whenever possible to avoid unreasonableness or "conflict with the law of another state." *Id.*, cmt. g.

Principles of comity are also firmly established in Canadian jurisprudence. The Supreme Court of Canada has defined comity in terms that echo decisions of this Court. In *De Savoye* v. *Morguard Invs. Ltd.*, 3 S.C.R. 1077, 1096 (Can. 1990), the Supreme Court recognized that "'comity' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." *Id.* Rather, because it is founded on "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws," comity cannot legally be disregarded. *Id.* (*citing Hilton* v. *Guyot*, 159 U.S. 113, 163-64 (1895)).

In this case, no reason appears for either the Ninth Circuit or this Court, in interpreting the FSIA, to decline to follow international law, which counsels that United States courts should give considerable weight to the views of the Government of British Columbia -- the entity that created Powerex -- as to whether Powerex is entitled to be accorded the procedural safeguards due a sovereign under the FSIA. 28 U.S.C. § 1603.

III.

THE DECISION BELOW CONFLICTS WITH PRINCIPLES OF INTERNATIONAL LAW UNDER WHICH ENTITIES EXERCISING SOVEREIGN FUNCTIONS SHOULD BE TREATED AS SOVEREIGNS.

The newly adopted United Nations Convention on the Jurisdictional Immunities of States and Their Property has codified the customary international law of State immunity. Article 2(1)(b)(iii) of that Convention includes in the definition of a "State" "agencies or instrumentalities of the State or other entities, *to the extent that they are entitled to perform and are actually performing* acts in the exercise of sovereign authority of the State." G.A. Res. 59/38, *supra* (emphasis added). The Convention thus confirms the importance under international law of an entity's *function* in analyzing whether it qualifies for sovereign treatment.

Although the Ninth Circuit correctly held that the Province of British Columbia, a political subdivision of Canada, is entitled to sovereign treatment under the FSIA, *see NRG Energy, Inc.*, 391 F. 3d at 1024-25, it did not consider the "function" test applied by courts around the world to determine whether agents and sub-agents of political subdivisions should also be accorded sovereign status. *Cf.* Canadian State Immunity Act, R.S.C., ch. S-18, § 2 (1985). Yet, under international law, the function test should be considered in deciding whether an "agent" or an "organ" is to be treated as a sovereign. *See, e.g.*, Brownlie, *supra* at 336-37.

In many countries, including Canada and the United States, separate juridical status creates a presumption against

immunity. However, that presumption is overcome when the entity is exercising sovereign functions. This approach can be found in the legislation of the United Kingdom, South Africa, and others. *See* State Immunity Ordinance, No. VI of 1981, § 15(2) (Pakistan); State Immunity Act, Cap 313, § 16(2), *available in* Materials on Jurisdictional Immunities of States and Their Property (United Nations Legislative Series), U.N. Doc. ST/LEG/SER.B/20 32 (1982) (Singapore); Foreign States Immunities Act 87 of 1981, § 15(1) (South Africa); State Immunity Act, 1978, § 14(2) (U.K.), *reprinted in* 17 I.L.M. 1123 (1978). In countries such as Australia, legislation provides as well that agencies and instrumentalities of foreign States are immune in relation to acts of sovereign authority if the immunity had been available to the State itself in the circumstances. Foreign States Immunities Act, 1985, No. 196 of 1985, *amended by* Statute Law (Miscellaneous Provisions) Act, 1987, No. 141 of 1987. Thus the function test enjoys widespread acceptance by States and forms a relevant ground of decision that was ignored by the Ninth Circuit.

Under the function test, as under the principles of comity of nations addressed above, the views of the Province of British Columbia are of special relevance. Given British Columbia's position that Powerex was created to fulfill a sovereign function, and that it was doing so at all times relevant to this action, this Court should, consistent with international law and practice, accord to Powerex the procedural benefits it seeks under the FSIA.

CONCLUSION

This Court should follow principles of international law and the practice of States regarding comity of nations, including the importance of the "function test" to determine

whether Powerex is to be treated as a sovereign. Under these principles, it was unreasonable for the Ninth Circuit to construe the FSIA to exclude from the definition of "sovereign" a corporation wholly owned by an agent of British Columbia, which British Columbia considers to have been carrying out a sovereign function. Furthermore, because the Ninth Circuit's holding creates non-uniformity in the rules the United States Courts of Appeals apply to determine sovereign status under the FSIA, Canada urges this Court to grant the petition for *certiorari*, and to reverse the judgment of the court below.

Dated: Washington, D.C.
August 17, 2005

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